(3)

Nos. 86-1438, 86-6209, 86-6336, and 86-6544



# In the Supreme Court of the United States

OCTOBER TERM, 1986

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BOBBY ROY DENNIS, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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SHARON DENISE COHEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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BRENDA JEWELL HURLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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CLARENCE BOBBY JENNINGS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court committed reversible error by failing to require the jury to return a special verdict specifying the controlled substances that were the objects of a distribution conspiracy, when there was overwhelming evidence that the conspiracy charged and proved included among its objectives the distribution of heroin and cocaine, and the defendant was convicted of substantive counts of possession of heroin and cocaine with intent to distribute them (No. 86-6336).

2. Whether petitioners established a prima facie case, under *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), that the prosecutor had improperly exercised his peremptory challenges (Nos. 86-1438, 86-6209, and 86-6544).

3. Whether the district court abused its discretion when, after both sides indicated satisfaction with the jury, the court refused to strike the entire jury panel or to resume questioning the jurors about the effect on them of responses given by other, excused veniremen (Nos. 86-1438, 86-6209, and 86-6544).

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**OPINION BELOW**

The opinion of the court of appeals (86-6336 Pet. App. A) is reported at 786 F.2d 1029 and, as amended, at 804 F.2d 1208.

## JURISDICTION

The judgment of the court of appeals was entered on April 14, 1986. A petition for rehearing was granted in part on November 24, 1986, and a suggestion for en banc consideration was denied on December 24, 1986. The petition for a writ of certiorari in No. 86-1438 was filed on February 21, 1987; in No. 86-6209, on January 17, 1987; in No. 86-6336, on February 9, 1987; and in No. 86-6544, on February 25, 1987. The petition in No. 86-6544 is therefore out of time under this Court's Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on a number of related narcotics charges. All four petitioners were convicted on one count of conspiring, in violation of 21 U.S.C. 846, to possess heroin, cocaine, marijuana, and talwin with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Count 1).[1] In addition, petitioner Dennis was convicted of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 7).[2] He was also convicted on 15 substantive counts of possession of heroin and cocaine with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Counts 2, 3, 6, and 8 through 19) and on one count of using the telephone to facilitate the conspiracy, in violation of 21 U.S.C. 843(b) (Count 5). He was sentenced to a total of 44 years' imprisonment and was fined $50,000.

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[1]Talwin is a Schedule IV controlled substance that is used in the manufacture of synthetic heroin.

[2]The district court vacated petitioner Dennis's conviction on Count 1 in light of his conviction on Count 7. 86-6336 Pet. App. 1037 n.5; see *Jeffers* v. *United States*, 432 U.S. 137, 148-150 (1977) (opinion of Blackmun, J.).

Petitioner Cohen was also convicted on one substantive count of possession of heroin, cocaine, and marijuana with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Count 10); and on one count of making a false statement before a grand jury, in violation of 18 U.S.C. 1623 (Count 21). She was sentenced to concurrent ten-year terms of imprisonment on Counts 1 and 10, and a consecutive one-year term of imprisonment on Count 21. 86-6336 Pet. App. 1032, 1040 n.14.

Petitioner Hurley was also convicted on four counts of possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Counts 9 through 11 and 16). Those counts included counts charging her with possession of cocaine and heroin with intent to distribute them. She was sentenced to five concurrent four-year terms of imprisonment. 86-6336 Pet. App. 1032, 1038, 1040 n.14.

Finally, petitioner Jennings was convicted on three counts of possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (Counts 15 through 17). Those counts included counts charging the possession of cocaine and heroin with intent to distribute them. Jennings was also convicted on one count of making a false statement before a grand jury, in violation of 18 U.S.C. 1623 (Count 20). He was sentenced to a seven-year term of imprisonment on Count 1; a consecutive one-year term of imprisonment on Count 20; and five-year terms of imprisonment on each of Counts 15 through 17, to run concurrently with each other but consecutively to the terms on Counts 1 and 20. 86-6336 Pet. App. 1032, 1038, 1040 n.14.

The evidence at trial showed that, from early 1979 through June 1984, petitioner Dennis and co-defendant Johnny Bernard McClenton jointly supervised and controlled a massive and highly lucrative narcotics distribution

enterprise (86-6336 Pet. App. 1032, 1039 n.13).[3] The enterprise enlisted the assistance of a number of young women who packaged and stored drugs in their homes or apartments, frequently in return for payment of their rent or household expenses. The organization also employed street-level "lieutenants" who retrieved the packaged narcotics from the homes where they were stored, and delivered them to street-level sellers (*id.* at 1032).

Petitioner Hurley stored marijuana, cocaine, and heroin in her apartment for several months in 1982, and the enterprise operated out of that location at the time. Petitioner Cohen was a street-level seller and sold cocaine and heroin out of her home. Petitioner Jennings was a street-level lieutenant. 86-6336 Pet. App. 1032.

2. a. Petitioners are black. The government exercised three of the six peremptory challenges it was allowed during the selection of the jurors who decided the case, using two to challenge blacks. The government exercised one of the two peremptory challenges it was allowed during selection of the alternates, using that challenge to strike a black. 86-6336 Pet. App. 542. In each instance, defense counsel requested that the district court inquire into the government's reasons for striking the prospective jurors to determine whether the prosecutor was exercising his peremptory challenges on the basis of race (*id.* at 541). Those requests were denied (*ibid.*).

Two black women were eventually seated on the jury that convicted petitioners (86-6336 Pet. App. 542-543). None of the defense counsel made a claim that the prosecutor was striking jurors based on their gender.

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[3]McClenton pleaded guilty and testified for the government at trial (86-6336 Pet. App. 1032).

b. The district court conducted a lengthy voir dire examination of the panel of prospective jurors. A principal area of inquiry was the extent to which potential jurors had been exposed to and affected by pretrial publicity about the case. In addition the court inquired whether any panel member felt he might not be able to give petitioners a fair trial as a result of his opinions about illicit drugs. 86-6336 Pet. App. 1042. Five jurors indicated that they might not be able to render an unbiased decision. The child of one venireman had been murdered in a drug killing; the child of another had died of a drug overdose; and the daughter of a third was a drug user. *Id.* at 1042, 1043. A fourth venireman explained that his bias stemmed from seeing the effects of drugs on his co-workers, and the fifth stated that, from "experience that I would care not to discuss right now," he did not think he could be unbiased (*id.* at 1043). The five were excused for cause.

The court continued its examination of the venire to determine whether any member would have difficulty honoring the presumption of innocence and requiring the government to prove its case beyond a reasonable doubt. The court also asked whether the jurors would decide the case in accordance with the instructions on the law that the court would give. Whenever any juror revealed anything suggesting possible bias, the court followed up with specific questions directed at determining the nature and extent of any possible bias on that juror's part. After both sides had accepted the jury and the jurors had been excused for the day, petitioners moved to strike the entire panel because of the assertedly prejudicial effect on the panel of the statements made by the five excused veniremen. Alternatively, they requested further examination of the jurors to determine the prejudicial effect of the statements. The district court denied the motion and conducted no further examination of the jury regarding the impact of the statements of the veniremen. 86-6336 Pet. App. 1043.

3. Petitioners raised 11 issues on appeal (86-6336 Pet. App. 1033, 1049). They claimed, among other things, that the district court had erroneously denied the request of petitioners Hurley and Dennis (not joined by petitioners Jennings and Cohen) for a special verdict on Count 1 so that the jury could specify which drugs it found to be the objects of the distribution conspiracy. Petitioners argued that it was not clear what drugs the jury had concluded were the objects of the conspiracy, and that it was therefore error for the district court (1) to refuse to strike statements in petitioner Hurley's presentence report, which would affect her parole guidelines, that she had been convicted of participating in a heroin and cocaine conspiracy, and (2) to impose on petitioner Jennings a prison sentence on Count 1 that exceeded the maximum five years allowed for a distribution conspiracy whose only object is marijuana.[4] 86-6336 Pet. App. 1037-1038.

Petitioners also argued that the district court abused its discretion by not examining the veniremen individually to determine the extent of any prejudice arising from the responses of the five excused panel members. Finally, petitioners contended that blacks, or black males, were unconstitutionally excluded from the jury because the prosecutor had used peremptory challenges to strike two black males from the prospective jury and one black male alternate without being required to state a racially neutral reason for doing so. 86-6336 Pet. App. 1048.

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[4]At the time of petitioners' offenses, in the absence of certain enhancing factors the maximum sentence for possession of marijuana with intent to distribute it was five years' imprisonment and a $15,000 fine (21 U.S.C. 841(b)(1)(B)), and the maximum sentence for possession of heroin or cocaine with intent to distribute it was 15 years' imprisonment and a $25,000 fine (21 U.S.C. 841(b)(1)(A)). The allowable penalties for conspiracy to violate Section 841 are identical to the allowable penalties for the substantive offenses (21 U.S.C. 846). The maximum penalties for these offenses were increased in 1984 (Pub. L. No. 98-473, Tit. II, §§ 224(a), 235, 98 Stat. 2030, 2031-2032).

The court of appeals rejected all three claims. First, it held that petitioners could not prevail on their special verdict claim simply by showing that they were convicted on conspiracy instructions that might permit the jury to return a guilty verdict if the conspiracy did not involve heroin or cocaine. It must also appear, said the court, that the evidence would support such a construction of the jury's verdict. 86-6336 Pet. App. 1039. The court accepted petitioners' argument that, as an abstract matter, the jury instructions on the conspiracy count could be read to allow the jury to convict them of the Count 1 conspiracy even if the jury had not found that one of the objects of that conspiracy was the distribution of heroin or cocaine (*ibid.*). Looking at the jury's verdicts on all the counts as well as the evidence presented at trial, however, the court concluded (*id.* at 1039-1040 (footnote omitted)):

> [T]here can be no question that the single conspiracy of which all the defendants were convicted was not a conspiracy to distribute only drugs for which [the maximum sentence was] five years in prison * * *. Rather, the evidence is overwhelming that the massive conspiracy charged and proved in this case included among its objectives the distribution of heroin and cocaine. * * * Further, appellants Jennings, Hurley and Cohen were each convicted of substantive offenses involving heroin and cocaine which appear clearly from the evidence to have occurred pursuant to the distribution conspiracy charged in Count One. * * * [W]e find it clear beyond a reasonable doubt that, as the district court concluded, the jury by its verdict found [petitioners] to have joined a conspiracy to distribute heroin and cocaine.

Second, the court of appeals held that the district court used a reasonable procedure for testing the impartiality of the prospective jurors. Moreover, the court held that the

statements of the five excused panel members were insufficient to require the court to conduct additional voir dire of the remaining members. Although acknowledging that the statements might have heightened the remaining jurors' awareness of the possible consequences of drug use, the court concluded that they did not pose any threat to the fairness and legality of petitioners' trial. 86-6336 Pet. App. 1044.

Third, the court of appeals held that petitioners had not established a prima facie case of purposeful discrimination against blacks in the selection of the petit jury. The court initially rejected petitioners' claim on the basis that they had not met the standard of *Swain* v. *Alabama*, 380 U.S. 202 (1965), while also noting that "we would find that [petitioners] have not made out a prima facie case of racial discrimination in the government's use of its peremptory challenges even if we were not foreclosed from considering such a claim by *Swain*" (86-6336 Pet. App. 1049 & n.24). On panel rehearing in light of this Court's decision in *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), the court held squarely that petitioners had not made out a prima facie case (86-6336 Pet. App. 542).[5] The court noted that such a decision would ordinarily be made in the district court, but a remand would not be necessary in this case, because the record fell so far short of establishing a prima facie case that a district court finding that petitioners *had* established a prima facie case would constitute reversible error despite the great deference owed to the trial court's findings (*id.* at 542 n.22).

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[5]As a threshold issue, the court of appeals held that the cognizable racial group for purposes of this analysis was the group of all blacks, and not just black males, as petitioners had urged (86-6336 Pet. App. 542).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Petitioner Hurley contends (86-6336 Pet. 5-8) that it was error for the district court to deny her request for a special verdict on Count 1 so as to determine the exact scope of the conspiracy of which the jury convicted her.[6] Although petitioner received a four-year sentence on Count 1, less than the allowable maximum for a conspiracy to distribute marijuana alone, she nevertheless claims prejudice from the absence of a special verdict, because the inclusion in her presentence report of references to heroin and cocaine as objects of the distribution conspiracy has resulted in harsher parole guidelines governing her release (86-6336 Pet. 6).

For reasons stated in our brief in opposition in No. 84-409, *Beasley v. United States*, cert. denied, 469 U.S. 1188 (1985), a copy of which is being served on counsel, we believe that it is not error for a trial court to deny a request for a special verdict when an indictment charges a single conspiracy with the objectives of distributing both drugs covered by 21 U.S.C. 841(b)(1)(A) (15-year maximum) and drugs covered by 21 U.S.C. 841(b)(1)(B) (five-year maximum). In brief, we think that the language, structure, and legislative history of Section 841 suggest that the type of controlled substance distributed by the defendant is not one of the elements of a Section 841 offense that must be found by the jury. Instead, the elements for jury determination are described in Section 841(a), which in relevant part makes it

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[6]Although petitioner Hurley states (86-6336 Pet. 6) that petitioners Jennings and Cohen join in this argument, neither of those petitioners cross-references the petition in No. 86-6336 or otherwise presents the issue. Thus, we address only petitioner Hurley's argument.

a crime simply to "possess with intent to * * * distribute * * * a controlled substance." Section 841(b) then sets out the sanctions to be applied by the district court when an offense of the type described in Section 841(a) has been proved; it establishes the range of penalties that may be imposed for trafficking in various types of controlled substances. The nature of the substance involved therefore is relevant only to the trial judge's sentencing determination.[7] The judgment below was therefore correct for the reason (on which the court of appeals did not rely) that the trial judge was right not to require a special verdict.

Nevertheless, even assuming that the district court should have required a special verdict, the court of appeals correctly concluded that its failure to do so was not reversible error in the circumstances of this case. That conclusion is not in conflict with the decision of any other court of appeals.

The record in this case leaves no doubt that the Count 1 conspiracy included an objective to distribute cocaine and heroin. First, some of the substantive possession counts on which petitioner was convicted involved heroin and cocaine only, and it is clear from the evidence that these substantive offenses occurred pursuant to the distribution conspiracy charged in Count 1. Moreover, the evidence was overwhelming that the massive conspiracy charged and proved in this case included among its objectives the distribution of

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[7]This conclusion is consistent with the uniform holdings of the courts of appeals that a defendant need not know the precise nature of the drug he possesses in order to violate Section 841(a)(1), which refers only to "a controlled substance." *E.g., United States* v. *Lopez-Martinez*, 725 F.2d 471, 472-475 (9th Cir.), cert. denied, 469 U.S. 837 (1984); *United States* v. *Berick*, 710 F.2d 1035, 1040 (5th Cir. 1983), certs. denied, 464 U.S. 899 and 464 U.S. 918 (1983); *United States* v. *Lewis*, 676 F.2d 508, 512 (11th Cir.), cert. denied, 459 U.S. 976 (1982); *United States* v. *Morales*, 577 F.2d 769, 776 (2d Cir. 1978); see also *United States* v. *Normandeau*, 800 F.2d 953, 956 (9th Cir. 1986).

heroin and cocaine. 86-6336 Pet. App. 1040. In light of the evidence at trial and the unchallenged jury verdicts on the substantive counts, the court of appeals was correct in determining "beyond a reasonable doubt that * * * the jury by its verdict found [petitioner] to have joined a conspiracy to distribute heroin and cocaine" (*ibid.*).

Even on petitioner's theory of the case (86-6336 Pet. 6-8), there is no conflict among the courts of appeals. In *United States* v. *Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984), for example, there were no substantive possession convictions that might have reflected the jury's judgment that the conspiracy with which the defendant had been involved included cocaine trafficking as one of its objects (732 F.2d at 1083). Nor was there overwhelming evidence showing that the conspiracy count included both cocaine and marijuana; marijuana was the only controlled substance for which proof of at least one specific transaction was offered (*ibid.*). Indeed, the *Orozco-Prada* court distinguished *United States* v. *Peters*, 617 F.2d 503, 506 (7th Cir. 1980), on factual grounds equally applicable to this case: Peters had been convicted of substantive drug offenses carrying 15-year penalties, thereby evidencing the jury's belief in his guilt of conspiracy to commit those substantive offenses (732 F.2d at 1084).

In *United States* v. *Quicksey*, 525 F.2d 337, 339-341 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and *Brown* v. *United States*, 299 F.2d 438, 439-440 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962), the defendants were not charged with conspiracies to distribute two or more drugs treated differently under Section 841(b), but rather were charged in a single count with conspiracies in violation of two different statutes. It is far from clear that the Fourth or D.C. Circuit would apply these cases in the present context. Moreover, even if they would do so, those cases are not in conflict with the decision below. Neither court remotely

suggested a rule of per se reversal that applies even when the court of appeals examines the evidence and finds "beyond a reasonable doubt" that the defendant committed the more serious of two conspiracies that theoretically could underlie the jury's general verdict.[8] In the absence of any such suggestion, there is no disagreement among the circuits that requires resolution by this Court.

2. Petitioners Dennis, Cohen, and Jennings all argue (86-1438 Pet. 7-22; 86-6209 Pet. 17-22; 86-6544 Pet. 17-22) that the district court's denial of their request that the prosecutor explain his decision to strike two blacks from the jury and one black alternate conflicts with the Court's decisions in *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), and *Griffith* v. *Kentucky*, No. 85-5221 (Jan. 13, 1987).[9] Petitioners are not entitled to rely on this claim because they failed to make the threshold showing that *Batson* requires to establish a prima facie case of purposeful discrimination in the selection of the jury.

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[8]Petitioner mischaracterizes the decision below as one in which the court applied the standards of "traditional sufficiency of evidence review" (86-6336 Pet. 8). The court below did not merely inquire whether the evidence was *sufficient* to support a verdict of conspiracy to distribute cocaine or heroin. Rather, it upheld the judgment of the district court only after noting that the evidence was "overwhelming," that the court was convinced "beyond a reasonable doubt" that the jury had found such a conspiracy, and that petitioner had actually been convicted of possession of heroin and cocaine with intent to distribute them. The court of appeals thus took an approach far more akin to "harmless error" review than to "sufficiency" review—an approach that is not in any way inconsistent with the decisions in *Quicksey* and *Brown*.

[9]In addition, petitioner Dennis argues (86-1438 Pet. 14-17) that the court of appeals erred by rejecting his claim that the cognizable group for purposes of *Batson* can be narrowed to include only black men. One simple answer to this claim is that he did not raise this issue in the district court at the time when the district court could have addressed it and thus did not preserve the issue for review. In any event, the decision of the court of appeals, on which we rely, correctly rejected this contention (86-6336 Pet. App. 542), and petitioner cites no authority that

Rejecting the "crippling burden of proof" (*Batson*, slip op. 12) of *Swain* v. *Alabama, supra*, this Court in *Batson* adopted a different test for establishing a prima facie case of racial discrimination by the prosecutor in the selection of the jury. Under the new test, a defendant must first show that he is a member of a cognizable racial group (*Batson*, slip op. 16). Second, he may rely on the presumption that one who is inclined to discriminate will use peremptory challenges to do so (*ibid.*). Finally, the defendant must show that these factors and any other relevant circumstances raise an inference that the prosecutor used the challenges to bar veniremen from the jury on account of their race (*ibid.*). This Court noted that, in evaluating the question, "the trial court should consider all relevant circumstances," including, but not limited to, a "pattern" of strikes against black jurors or questions and statements during voir dire that reflect a racial basis for strikes (*ibid.*). Once a defendant has made his prima facie showing, the burden then shifts to the prosecutor to provide a neutral explanation for challenging black jurors (*ibid.*).[10]

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supports it. Whatever the merits of *People* v. *Motton*, 39 Cal. 3d 596, 704 P.2d 176, 217 Cal. Rptr. 416 (1985) (en banc), it is a decision interpreting a *state* constitution and in any case holds only that black *females* are a "cognizable group." That holding was based on "the fact that black women face discrimination on two major counts—both race and gender" (39 Cal. 3d at 606, 704 P.2d at 181-182, 217 Cal. Rptr. at 421-422). The holding therefore would contradict, rather than support, any contention that black men suffer similar double discrimination.

[10]Petitioner Dennis claims (86-1438 Pet. 17-18) that certain language used by the court of appeals (86-6336 Pet. App. 542-543) departs from *Batson* and requires the defendant to show that the prosecutor attempted to exclude *all* blacks from the jury. The court of appeals did not so hold. The court simply commented that it was "obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury" (86-6336 Pet. App. 543). That observation was not the basis for the court's holding, but was merely one of the factors to which the court looked in finding that petitioners had not met the *Batson* requirement of showing a prima facie case based on "all relevant circumstances" that one or more peremptory challenges had been exercised on the basis of race.

As the court of appeals concluded, petitioners do not meet the *Batson* test. The prosecutor used only two of his six peremptory challenges to strike blacks from the venire. He used a third to strike a white prospective juror.[11] Although the prosecutor had three remaining challenges, he did not use them to strike the two blacks who remained on the jury that was sworn. These facts could not support an inference that the prosecutor was trying in any way to minimize the number of blacks on the jury.[12]

Contrary to petitioner Dennis's argument (86-1438 Pet. 19-20), nothing in *Griffith* v. *Kentucky, supra*, suggests that the foregoing facts make out a prima facie case.[13] The prosecutor in *Griffith* (who had also been the prosecutor in *Batson*, see *Griffith*, slip op. 12) had available five peremptory challenges and used four of them to strike four of the five prospective black jurors (*id.* at 2). The end result was an all-white jury (*ibid.*). In the present case, the prosecutor had available six peremptory challenges and used two of them to strike two of the four prospective black jurors, forgoing

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[11]The prosecutor also struck a black alternate.

[12]Petitioner Dennis speculates that one of the two black jurors struck from the main jury might have been a desirable juror from the government's point of view because his mother had been a burglary victim, and that the alternate juror challenged by the prosecutor might have been "sympathetic to the prosecution" because he had been a burglary victim and had testified as a government witness in other cases (86-1438 Pet. 7-8; see also 86-6209 Pet. 21; 86-6544 Pet. 21). The proposition that either juror would, because of those experiences alone, be desirable from the government's standpoint in this drug prosecution is dubious to begin with. In any event, it hardly follows from these factors that the only (or likely) explanation for the challenges was the race of the jurors. Any such inference, if it were tenable at all, would be severely undercut by the prosecutor's decision to forgo three of his allotted strikes and accept two black jurors.

[13]We assume for the sake of argument that the facts of *Griffith* constituted a prima facie case, although the Court's decision addressed only the retroactivity of *Batson*.

three of his challenges altogether. Two blacks sat on the jury. The facts of this case simply are not comparable to the facts of *Griffith*.

Petitioner Dennis's apparent suggestion (86-1438 Pet. 20) that a prosecutor must justify every single challenge of a black juror is doubly flawed. First, it overlooks the fact that, before the prosecutor is required to justify any of his strikes, the defendant is required to make a prima facie showing of discrimination, a showing that rarely will arise from a single strike.

Second, it relies on a misreading of *Batson*. The Court said that a " 'single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions,' " while making the point that since *Swain* the Court has recognized that a defendant may make a prima facie case of discrimination by relying on the facts in his particular case rather than necessarily comparing them to a pattern or practice of discrimination in other cases (*Batson*, slip op. 15, quoting *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 n.14 (1977)). It does not follow, however, that the record must show, without the defendant's having first established his prima facie case, an explanation for the prosecutor's strike of each black venireman.[14]

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[14]Petitioner Dennis quotes (86-1438 Pet. 20-21) from the decision in *United States* v. *David*, 803 F.2d 1567, 1571 (11th Cir. 1986), as if that case stood for the proposition that a prosecutor must explain every strike of a black venireman, without alluding to the defendant's prior burden to establish a prima facie case that the prosecutor has improperly used race as a factor in the exercise of peremptory challenges. In fact, however, *David* recognizes that the defendant must make out a prima facie case of discrimination before any explanation is required. In any event, if there were any tension between the decision below and either *David* or *Fleming* v. *Kemp*, 794 F.2d 1478, 1484 (11th Cir. 1986), it would be an intracircuit matter for the court of appeals to resolve. See

3. Petitioners Cohen and Jennings (86-6209 Pet. 3-16; 86-6544 Pet. 3-16) also claim that the district court erred when it refused petitioners' request to strike the entire panel or, in the alternative, to inquire of the prospective jurors whether they were unduly prejudiced by the information they had heard from the excused jurors regarding the effect of drugs on their family members.

It is well settled that a trial judge has broad discretion about how to conduct the voir dire examination. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188-189 (1981) (opinion of White, J.); *Aldridge* v. *United States*, 283 U.S. 308 (1931). The court of appeals reviewed the record in this case and found no abuse of discretion. Only the most extraordinary circumstances would justify this Court in disturbing that discretionary decision, and petitioners have cited none.[15]

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*Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). It is notable that petitioners' suggestion for en banc consideration received no votes among the judges of the Eleventh Circuit (86-1438 Pet. App. 87-88).

[15]Petitioners do not claim a conflict among the courts of appeals, nor is it important, as petitioners suggest (86-6209 Pet. 13-16; 86-6544 Pet. 13-16), that other district courts have handled voir dire in a different manner when faced with similar, or even the same, voir dire issues. See *United States* v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Gibbons*, 607 F.2d 1320 (10th Cir. 1979); *United States* v. *Corbin*, 590 F.2d 398 (1st Cir. 1979); *United States* v. *Montelongo*, 507 F.2d 639 (5th Cir. 1975); *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969). The essence of committing a particular matter to the discretion of the district court is that, within bounds of reason, two district courts can resolve an issue in different ways, yet both resolutions will be sustained on appeal. In any event, as it observed, the court of appeals had previously found, on facts almost identical to those in this case, that a situation such as the one in this case does not raise the specter of potential prejudice so as to require the district court to ask additional questions of the panel. 86-6336 Pet. App. 1044 (citing *United States* v. *Tegzes*, 715 F.2d 505 (11th Cir. 1983)).

The voir dire in this case took place over two days. The jurors who were excused for cause described their personal experiences and were excused on the first day of voir dire. At the time they were excused, counsel did not request additional inquiry of the other panel members, and the district court continued its voir dire, which included the instruction that petitioners were presumed innocent until proven guilty and that the presumption of innocence is a guiding principle in the administration of justice. No juror indicated that he would be unable to accord petitioners the presumption of innocence or that he would vote for a guilty verdict if the government had not proved its case beyond a reasonable doubt. Further questions were directed to uncovering any basis for doubting whether the jurors would be able to decide the case in accordance with the court's instructions. No juror revealed any basis for suspecting bias that was not immediately followed by additional questions.

At the end of the day, the jury was found acceptable to both sides, and the court excused the jurors for the night, directing them to return to be sworn the next day. Only at that point, and after they had learned that a district judge in another courtroom had struck a panel when the jurors who had been excused in this case gave the same responses during the selection of another jury, did defense counsel ask for additional questions or to have the jury panel struck. The district court's refusal to take either course was a legitimate discretionary judgment. To return to an issue that had arisen the prior day and delve into the jurors' reactions to the excused veniremen's responses was more likely to enhance the risk of prejudice by drawing attention to the comments. The district court's refusal to do so was no abuse of discretion and does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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